

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

WILLIAM SYPHER AND THE  
VERMONT STATE COLLEGES  
FACULTY FEDERATION, AFT  
LOCAL 3180, AFL-CTO

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DOCKET NO. 81-24

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 28, 1981, Dr. William Sypher ("Grievant") and the Vermont State Colleges Faculty Federation ("Federation") filed a petition with the Vermont Labor Relations Board, alleging the Vermont State Colleges ("Colleges") had violated Grievant's rights when they failed to reappoint him for a third year, specifically, that his employment with Castleton State College was terminated because of activity protected under the anti-discrimination and academic freedom articles of the collective bargaining agreement ("Agreement") and the First Amendment of the United States Constitution. Grievant also charged the Colleges failed to meet reasonable deadlines to enter evaluative material in Grievant's personnel file prior to notifying him of reappointment, thus depriving him of his contractual right to rebut the document.

Hearings were held before the Board on September 24, November 19 and December 10, 1981. Representing the Colleges was Attorney Nicholas DiGiovanni. Dr. Stephen Butterfield, Grievance Chairperson of the Federation, represented Grievant. Present for the Board on September 24 were Kimberly B. Cheney, Chairman; and James S. Gilson. William Kemsley was absent. All three Board members were present on November 19 and

December 10. Both parties objected to the hearing being held on September 24 in the absence of Mr. Kemsley. The Board proceeded with the hearing over the objections of the parties. At the December 10, 1981, hearing the parties expressed no objections to Kemsley reviewing the proceedings of the September 24, 1981, hearing and participating in the decision.

During the hearings the Colleges objected to raising the First Amendment question before this Board on grounds that the Board is not empowered by statute to hear or make determinations on Constitutional issues. Findings of Fact and Memorandum of Law were filed by the Federation and Colleges on January 8 and 11, 1982.

#### FINDINGS OF FACT

1. Grievant was hired by Castleton State College in August, 1979, as a full-time Assistant Professor of English. During his career at Castleton he taught courses in Composition, Technical Writing, Communication and the Nature and History of the English Language.

2. Grievant holds a Ph.D. in Communications and had taught previously at the University of Pittsburgh, Lund University in Iran, and Harvard University.

3. On February 12, 1980, Academic Dean Rosemarie Beston wrote an evaluation of Grievant in which she recommended him for a second year appointment to the College (Grievant's Exhibit #4). The evaluation cited his professional activities and a favorable recommendation from his Department Chairman, but then added: "his student evaluations rate him as a fair to very good teacher, but are generally mixed. Dr. Sypher should be told that the area where he is in most need of improvement at the present time is in his teaching and during the coming year, he

should show improvement in this area as a condition for reappointment for a third year." (Grievant's Exhibit #4)

4. The evaluations reviewed by Dean Beston were from Fall 1979 courses. The Dean rated Grievant's student evaluations mixed because while there were comments from students praising Grievant for being very well-prepared, there were some comments by students indicating he did not value student opinion, that he tended to put down student opinion, and that he had an attitude of believing his own opinion was most important.

5. The February 12, 1980, evaluation was placed in Grievant's personnel file on February 29, 1980 (Grievant's Exhibit #24). President Thomas Meier accepted the recommendation of his Dean and on February 29, 1980, reappointed Grievant to a second year at Castleton. (Grievant's Exhibit #7) At that time, the President and Dean met with Grievant and told him that he was going to be reappointed for a second year. At the meeting, Dean Beston told Grievant he should look at his student evaluations because some comments there needed his attention.

6. Grievant was a member of the Federation and regularly attended Union meetings. Further, he organized an effort to compensate Federation President John Gillen in the Spring of 1980 for his efforts in contract negotiations. Grievant's work on raising money for Gillen was not communicated to the administration.

7. Beginning in Spring Semester 1980 Grievant became one of many faculty members at Castleton critical of the administration's policies and actions.

8. Grievant was one of several people who organized faculty opposition to the low rate of pay for part-time faculty. He distributed

a draft of a petition to President Meier to faculty members stating his opinions on the subject (Grievant's Exhibit #3). A formal petition was never sent to President Meier. Grievant never discussed the issue with Meier and did not pursue it. Another faculty member, William Ramage, took over the movement to upgrade the pay of part-time faculty.

9. On February 26, 1980, Grievant gave a speech before the Faculty Assembly. In that speech he criticized President Meier's recently-issued document "Initiatives for Excellence". In particular he faulted the President for suggesting that faculty task forces not attack each other, only each others' ideas. He also objected to increasing the administrative staff and objected to the College pushing the faculty to publish articles when they had an abysmal library and virtually no graduate students to assist them in research. Grievant told President Meier his views on the President's document on academic excellence privately and then in the presence of Dean Beston and also made his views known to the Education Sub-Committee of the Colleges' Board of Trustees.

10. Grievant was a member of the Action Committee, a body formed in the Spring of 1980, to establish better dialogue between the faculty and the administration. Through the Committee Grievant criticized the administration for emphasizing the terminal degree and for providing insufficient funds for remedial education.

11. President Meier and Dean Beston both attended the first meeting of the Action Committee. At that meeting Grievant did not speak at all. President Meier was not present at any subsequent meeting of the Committee. Dean Beston did attend several of the meetings. At one of these meetings Grievant told Dean Beston the administration policy of compelling the

faculty to publish was a ruinous policy and would not lead to excellence, and he also criticized the requirement of the possession of a terminal degree.

12. On May 1, 1980, Grievant wrote a memo to the Action Committee entitled "Weather Report" (Grievant's Exhibit #9). The memo claimed the progress of the Committee to date was laudable but superficial and that the administration was "determined to redefine this institution in a way that the overwhelming majority of the faculty consider inappropriate, if not destructive". The memo attacked the terminal degree requirement and the perceived emphasis on publications, and concluded: "In the brave new world of Castleton, only the craven who submit to redefinition will succeed. The naive idealistic and humane faculty who unashamedly love teaching...will be depreciated, if not humiliated and dismissed (humanely under our new accords)." Grievant gave a copy of this memo to one of the administration's secretaries, but no evidence indicates the President or the Dean saw a copy of this memo.

13. The Action Committee's faculty members were also members of the Federation and the efforts of the Committee were supported by the Federation.

14. During the Spring Semester of 1980 Grievant taught a course in the Education Department entitled "Multi-cultural Education". The Chairperson of the Education Department, Virginia Larrabee, went to Dr. Beston and told her that the students in that class were very upset with the teaching attitude of the instructor, that they felt that their opinions were not being valued in the class. Larrabee asked Beston that Grievant never be allowed to teach in her Department again. Beston never discussed Larrabee's remarks with Grievant.

15. On May 7, 1980, Grievant sent a letter to Dean Beston protesting her February 12, 1980, recommendation that he be reappointed in which she stated that his student evaluations were "mixed" and that his reappointment for a third year was contingent on improving his teaching. Grievant stated that students rated his teaching close to very good and commented, "it is certainly distressing when very good is not good enough, especially at a college with a modestly-talented student body that often discourages efforts at subtlety, wit and deeper penetration of subjects".

16. In response to the May 7, 1980 letter, Dean Beston met with Grievant. At this meeting Grievant asked Beston why she was going after him when there were other faculty less conscientious than he was about meeting their responsibilities.

17. Dean Beston subsequently amended her February recommendation on August 5, 1980, to include recognition that Grievant's "student evaluations in one course (not in general) could be described as mixed; other courses evaluated as very good." (Grievant's Exhibit #10)

18. President Meier addressed the faculty and the freshman class at the Convocation of August, 1980, which opened the Fall term. Grievant was present during this address. The President stated that the percentage of terminal degrees among faculty had increased from 30 percent to 50 percent in his first year, library acquisitions had increased, faculty-administration cooperation had improved, and Castleton could attract administrative and faculty talent in competition with the best colleges in the country.

19. In the September 5, 1980, edition of the Rutland Herald, Grievant was quoted as saying, "we were offended almost beyond description" by Meier's speech. "I was just flabbergasted. We can't sit back and

let the President set an example of dishonesty." Further, Grievant was quoted as saying, the College faculty "wishes Meier no personal ill will, we just wish he would leave." The article notes the faculty were planning to rebut the President's speech in a gathering of faculty and students the following week, that Grievant was active in organizing the gathering and would be making rebuttals to Meier's speech (Grievant's Exhibit #27). President Meier and Dean Boston both read this article at the time it was published.

20. Grievant, along with several other faculty members, organized a public protest against the President's remarks, a "reconvocation". This reconvoation took place on or around September 11, 1980. Grievant wrote the address for the reconvoation and it was delivered by Professor Tom Smith, Chairman of the English Department. Professor Smith is a tenured faculty member with 16 years of service to the College. The audience included Dean Boston, President Meier, Grievant and several hundred faculty and students.

21. The reconvoation address stated that the "increase" in library terminal degrees was obtained by reclassifying Master's Degrees already possessed by the faculty as "terminal"; that the "increase" in library acquisitions was the result of inflation in the book publishing industry and did not reflect a real increase in percentage of books acquired; that the President approved only pro forma resolutions passed by the Faculty Assembly and did not cooperate on substantive issues; and that Castleton was unable to fill important vacancies in faculty and staff.

22. At the time this faculty address was made by Professor Smith, neither President Meier nor Dean Boston were aware Grievant was the author of the address, but were aware from the September 5, 1980, Rutland Herald article Grievant was active in the formation and content of the "reconvocation".

The Dean and President became aware Grievant was the author of the address after the decision was made to not reappoint him.

23. On October 18, 1980, Grievant attended a wine and cheese party held in honor of Dr. Bramwell, a specialist in language use, who was visiting the campus. Dean Beston and her husband, John Beston, were also in attendance along with about seven other people including President Meier. During the party, Grievant asked Dr. Bramwell if he had written anything about jargon, such as administrative jargon by deans.

24. Dean Beston took Grievant's comments about use of jargon by deans as a personal statement about her. She was offended by the statement and thought the remarks inappropriate.

25. On the day following the wine and cheese party, John Beston went to Grievant's office and got into a very heated argument with him. Beston accused Grievant of a "cowardly, sneaky" attack on his wife. At one point in the argument, Beston asked Grievant, "what have you published? It's easy to write letters." Up to this time, Grievant had written no public letters. The only letters he had written were through the Action Committee and the letter to Dean Beston challenging and rebutting her evaluations of his work. Grievant inferred from this comment that John Beston had read his letter to the Dean and the letters he wrote as a member of the Action Committee.

26. When Dean Beston's husband told her his view of the confrontation he had with Grievant, the Dean was upset at her husband because she did not want him involved in campus affairs.

27. Dean Beston and her husband spent some time in Australia which they perceive has a very anti-feminist orientation. In that environment the Dean's husband developed a very protective attitude towards her.



28. In Fall 1980 Dean Beston began a series of classroom observations of faculty to assist her in evaluating teaching effectiveness. After consultation with professional colleagues at a research center on faculty evaluation at Kansas State University, the Dean developed a procedure for the classroom observations, and on October 27, 1980, sent a memo to all faculty being considered for personnel decisions in 1980/81 advising them of the procedure she would follow (Colleges' Exhibit A).

29. Dean Beston began her classroom observations with second-year faculty since under the Agreement such faculty would have to be notified by December 15 if they were not going to be reappointed for a third year. Grievant was a second-year faculty member being reviewed for reappointment. In early November the Dean met with Grievant to discuss how his classroom observation would be handled. Grievant picked his class in "Non-Verbal Communication" as the class he wanted the Dean to visit.

30. Dean Beston went to his class on Non-Verbal Communication on November 11, 1980. On December 8, 1980, she wrote up her evaluation of Grievant's teaching on that date (Grievant's Exhibit #13). While the Dean believed Grievant ranked "above average" in demonstrated knowledge of subject matter and at the level of instruction appropriate, as well as in making effective use of instructional methods and materials, he "needs strengthening" on focusing "attention on the students, their questions and their growth". Her basis for this judgment was "students to your extreme right...at one point tried to ask a question and received no attention from you... The focus was too much upon you and your perceptions and not enough on them and the heightening of their awareness."

31. On December 9, 1980, Grievant met with Dean Beston and verbally disagreed with the statements in her evaluation report of December 8. He explained that her report misstated his goals, and that students in his classes were not required to raise their hands and were allowed to speak without waiting for his recognition. The Dean responded that the report was really not so bad; that he rated above average in two out of the three categories. The Dean informed Grievant her report was going to be part of the material the President would consider in deciding whether to reappoint Grievant, that such decision would be made by December 15 and that Grievant had the right to enter anything in his personnel file that would rebut the Dean's report.

32. Dean Beston observed the classes of four other faculty members that semester, all second-year faculty, and used the same format on each. All evaluations were written around the same time in order to ensure a standardized approach and treatment.

33. Grievant was aware that his reappointment for a third year was under review that week. He knew the President had to make his decision whether to reappoint him or not by December 15.

34. In his first three semesters at Castleton, Grievant was evaluated as a highly-effective and above average teacher by the Faculty Promotion, Retention and Tenure Committee; by his peers, Professors Evelyn Stagg and William Testerman; and by his Department Chairman Professor Tom Smith (Grievant's Exhibits 8, 11, 14, 25 and 26).

35. Dean Beston and President Meier used the August 8, 1980 Administrative Policy and Criteria for Initial Appointment, Promotion and Tenure of Full-time Faculty (Colleges' Exhibit B) in considering whether Grievant

should be reappointed for his third year. The 1980 criteria provide that in order to warrant reappointment in the first six years of employment, faculty performance should, among other things, be substantially above average in teaching effectiveness (Colleges' Exhibit B, pg. 8).

36. On December 10, 1980, Dean Beston recommended Grievant not be reappointed for a third year (Grievant's Exhibit #15). The recommendation contains no discussion or explanation of why the Dean recommended that Grievant not be reappointed. That recommendation was placed in Grievant's file the same day, along with the classroom evaluation (Grievant's Exhibit #24). Grievant first saw this recommendation on December 15, 1980, when he reviewed his personnel file (Grievant's Exhibit #23).

37. Dean Beston testified she recommended Grievant not be reappointed because she concluded, on the basis of the material in his personnel file, which included student evaluations, that he was not substantially above average in teaching effectiveness. She testified Grievant's student evaluations showed a pattern that he did not value or respect student opinions and that this pattern was an important part of her judgment to recommend against reappointment.

38. In reaching her recommendation, Dean Beston reviewed the personnel file of Grievant plus the student evaluations for the Fall semester 1979 and Spring semester 1980. She did not review his evaluations for Fall 1980 because they were not yet completely in at the time of her recommendation.

39. There were five second-year faculty members reviewed for reappointment in December, 1980. Dean Beston recommended the other four faculty members be reappointed.

40. President Meier did an independent review of Grievant's case, reviewing his personnel file, all recommendations and student evaluations. Unlike Dean Beston, he had access to the Fall 1980 student evaluations as well. Upon completion of that review, President Meier decided not to reappoint Grievant on December 12, 1980 (Grievant's Exhibits #16, #17).

41. President Meier testified he agreed with Dean Beston that Grievant was not substantially above average in teaching effectiveness and that the essence of that conclusion rested on the substantial number of comments expressed by students that they felt put down by Grievant, that their opinions were not considered or valued by him in class. He noted this type of comment had surfaced during Grievant's first semester at the College and was evident to an even greater degree in the Fall 1980 student evaluations.

42. Much evidence on student evaluation results was submitted in the case before us, including a sample of the evaluation form (Grievant's Exhibit #22), excerpts from students' handwritten comments (Colleges Exhibit D, Grievant's Exhibit #28, #32), a comparative numerical study of student responses to questions (Grievant's #33, and testimony of Witness Butterfield), and all the evaluations generated from courses taught by Grievant for the semesters: Fall 1979, Spring 1980, and Fall 1980 (Grievant's Exhibit #29, #30, #31).

43. On the evaluations students are asked a series of 11 evaluative questions, including: 1) Does the instructor encourage students to ask questions, disagree, express their ideas, etc?; 2) Considering everything, how would you rate this instructor? and 3) Considering everything, how would you rate this course? Students are offered a choice of five ratings from poor to excellent; a rating of (1) being poor and a rating of (5) being excellent.

44. In answer to the question, "Considering everything, how would you rate this instructor?", Grievant's students responded as follows:

For Fall 1979, 38 out of 54 students gave Grievant an above average rating; 10 rated him average and 6 below average.

For Spring 1980, 32 out of 46 rated him above average; 6 rated him average and 8 below average. Five of the 8 below-average ratings for this semester came from one course, "Multi-Cultural Education".

For Fall 1980, 39 out of 57 rated him above average; 10 average and 8 below average.

45. In answer to the question, "Does the instructor encourage students to ask questions, disagree, express their ideas, etc.?", Grievant's evaluations show the following ratings for all courses, semester by semester:

For Fall 1979, 42 out of 55 students gave Grievant an above-average rating; 7 rated him average and 6 below average.

For Spring 1980, 38 out of 46 students rated Grievant above average; 3 rated him average and 5 below average.

For Fall 1980, 44 of 56 students rated Grievant above average; 7 rated him average and 5 below average.

46. On the evaluation forms, students also had an opportunity to indicate their opinion of an instructor by a handwritten comment. Some comments criticized Grievant for not valuing their opinion and for demanding that their opinion agree with his. The number of forms with such comments on them on a semester-by-semester basis is as follows:

Fall 1979	- 8
Spring 1980	- 7
Fall 1980	- 13

Some of the negative comments include: "He does not like you to disagree with what he says... Even when students try to disagree he shoots you down and tries to degrade you in front of the class... Is sometimes very one-sided and is sometimes humiliating... No matter what is said, he cuts it down and tears it apart... He encourages us, but as soon as we ask a question he keeps at us and embarrasses us or backs us in the corner so we don't dare to ask more questions... Never discuss your own ideas, only his."

The 18 students in Fall 1980 that criticized Grievant for not valuing their opinions, gave Grievant an overall rating of (3) or "average" on how they would rate Grievant as an instructor.

47. Some handwritten comments also praised Grievant highly for respecting student opinion. The number of forms with such positive comments on them, semester-by-semester, was as follows:

Fall	1979	-	5
Spring	1980	-	9
Fall	1980	-	17

Some of the positive comments were: "encourages student participation as much as possible... encourages students to express their ideas freely and not worrying how "dumb" it may sound... always wants your point of view... he expects, encourages, desires to hear our thoughts and opinions... is an open book who is just waiting for us to voice our opinions.

48. It is typical for most faculty to get some negative student evaluations.

49. Sufficient evidence existed in Grievant's personnel file from which the President and the Dean could reasonably conclude Grievant was not substantially above average in teaching effectiveness.

50. Professors Anne Sheppard and Patrick Cavanaugh were rated by Dean Beston and President Meier as above average in teaching ability. Both these instructors are untenured junior faculty, hired in the same year as Grievant, and both were reappointed for a third year.

51. For Fall 1979 and Fall 1980, in comparing students' responses to the question, "Considering everything, how would you rate this instructor?" and "Considering everything, how would you rate this course?", Professor Sheppard received a lower overall rating from students than Grievant; for Spring 1980, Sheppard received a higher overall rating than Grievant. For Fall 1979 Cavanaugh's and Grievant's overall ratings were comparable. For Spring 1980, Cavanaugh received a lower overall rating than Grievant, and for Fall 1980 Cavanaugh received a higher overall rating. In comparing the overall ratings received by Grievant, Cavanaugh, and Sheppard, there is little to distinguish among them. However, given the evidence before us, Grievant is the only one of the three whose evaluations show a pattern of not respecting student opinion, and the only one to excite such strong reaction in a Department that it be requested that he never be assigned to teach in that Department again.

52. No evidence was introduced to show that Sheppard or Cavanaugh participated in any kind of activity on behalf of the Federation or made criticisms of administrative policy and actions.

53. Professor Barbara Bloy was hired into the Castleton English Department in August 1977 and resigned in June of 1980. Bloy was a Federation member, an active participant and campus and community affairs with wide experience on College committees, held a terminal degree in her field and was an excellent teacher. Her professional

activities included public speaking on women's and political issues through the Vermont Council on the Humanities and various social agencies. Bloy participated in the screening process for hiring Dean Beston and recommended that she be hired.

54. Bloy criticized the President for adding three new deans to the administration, denying tenure to Professor Richard McDonald, and sacrificing faculty positions in favor of administrative positions. She also opposed the terminal degree requirement for tenure and the inadequate funding for the basic skills program. She made her views more and more public from December 1979 onward by speaking out at faculty meetings, giving interviews to newspaper and television reporters, and publishing letters in newspapers. She was also a member of the Action Committee. In February 1980, Bloy published her criticism of the terminal degree requirement in the Rutland Herald, charging that the Colleges were seeking "bargain basement teachers who constantly fear for their jobs". She also moved a "no confidence" resolution against the Colleges' Chancellor, Richard Bjork, in the Faculty Assembly, which was passed by that body.

55. On April 28, 1980, Bloy was interviewed by Dean Beston concerning her prospects for future employment at Castleton. This was a standard reappointment review given third year faculty. Professor Bloy had already been reappointed for a fourth year for Academic Year 1980-81 prior to December 1979. At this interview, Bloy was told by the Dean that she was "wasting her time" on social issues and should concentrate more on written scholarship and publications in order to have a better chance of being granted tenure. Bloy had no publishing record. Although



the Dean gave Bloy no indication she would not be renewed, Bloy felt intimidated by this interview and was convinced from it she would not be reappointed for her fifth year (Academic Year 1981-82).

56. Bloy resigned her teaching position in June 1980. In her letter of resignation, Bloy accused the Castleton administration of acting in bad faith with the faculty. Bloy's reasons for resigning were she believed the administration's policies were destructive to the institution, and she would be retaliated against for exercising her right to criticize that policy, by being denied reappointment. She believed, regardless of what criteria she met, the College would find a pretext to terminate her employment.

57. Professor Evelyn Stagg, an Associate Professor of English at Castleton for the past 16 years, has recently resigned from her position at Castleton. The reason she has resigned is because she is not happy with the atmosphere there, that it is not an atmosphere which encourages dissension or discussion, and that it is not an atmosphere tolerant of good teaching.

58. During the Summer of 1981, President Meier distributed merit money for 1980-81 (retroactively) and 1981-82 in accordance with the newly-agreed upon collective bargaining agreement. The President had complete discretion to award the money as he saw fit. Out of some 80 faculty, 27 received merit increases (Colleges' Exhibits H and I). Among those receiving merit increases from President Meier were Thomas Smith, who delivered the principle reconvoation speech attacking the President; William Ramage, who lead the movement to upgrade the pay of part-time faculty members; Robert Gershon, who attacked the development

of the Colleges' policy on tenure prior to their final adoption; Warren Cook and Bruce Burton, founding fathers of the Federation; Stephen Butterfield, Grievance Chairperson of the Federation; Donald Jung, a member of the Union negotiating committee; and Virginia Larrabee, a member of the Action Committee (Colleges' Exhibits E and G). Cook, Smith, Butterfield, and Burton are all tenured faculty.

59. The President is also responsible for the award of Faculty Development Funds (Colleges' Exhibit J). Among those to whom President Meier awarded funds in May, 1981, for Academic Year 1980-81 were: Bill Jordan, the Chairman of the Action Committee; Peter Anthony, statewide President of the American Federation of Teachers, the Federation's parent body; and Warren Cook.

60. The merit awards and faculty development funds awarded by President Meier all post-date the time of the present grievance, and the President knew he was being charged with discrimination on the basis of union activity when he gave them.

61. On January 23, 1981, Stephen Butterfield, Federation Grievance Chairperson, grieved Grievant's non-reappointment, alleging violations of Article III.14, IV, V, and XXII of the Agreement. The alleged violation of Article XXII stated was: "College has failed to publish criteria for reappointment; College failed to consider criteria in Article XXII.1.) There is no claim in the grievance the Colleges violated the Agreement by the Dean's late filing of her non-reappointment recommendation or classroom observation report (Grievant's Exhibit #18).

62. On February 6, 1981, the Federation filed an addendum to the January 23, 1981, grievance. Therein, the Federation requested Dean

Beston add the following violation to the grievance: "Article XXII: failure to meet deadlines in entering evaluations/recommendations in personnel file" (Grievant's Exhibit #19).

63. Castleton was on Christmas recess from December 18, 1980 through January 11, 1981.

#### OPINION

##### Procedural Issue

The first issue before us is whether the College violated contractual deadlines by not placing evaluative material in Grievant's file in a timely manner under Article XXII of the Agreement. The Federation contends the Dean's classroom observation report of December 8, 1981, and her negative recommendation of December 10, 1981, were not entered in Grievant's personnel file within a reasonable time prior to the nonreappointment decision. The Colleges contend the allegation on this point is untimely, since it was filed on February 6, 1981, as an addendum to the original grievance of January 23, 1981; 31 days after Grievant could have been aware of the alleged violations.

Relevant contractual language on timeliness is found in Article XIX, Grievance-Procedure, of the Agreement:

1. ..complaints must be registered within 30 calendar days (exclusive of all recesses in excess of seven (7) calendar days...) following the time at which the complainant could have reasonably been aware of the existence of the situation created by the College which is the basis for the complaint...

Step One A. The grievant shall submit his grievance in writing to the designated College official stating the nature of the grievance including relevant facts, the provision(s) of the Agreement alleged to have been violated, where relevant, and the adjustment sought.

6. Failure of the grievant...to comply with the time limitations of the complaint procedure or of steps one and two shall preclude any subsequent filing of the grievance by the Federation or grievant...

Here, Grievant was aware of the Dean's classroom observation report by December 9 when he met with the Dean and discussed the report with her.

The 30 calendar day clock thus began running on December 9 and stopped for the period December 18, 1980 - January 11, 1981, during the College Christmas recess. Thus, the alleged late filing of the classroom observation report had to be grieved by February 2, 1981. In the Step One grievance filed January 23, 1981, there is no mention of grieving the late filing of the report. It was not until February 6, 1981, that the failure of the College to meet evaluation/recommendation deadlines was grieved. The alleged violation with regard to the classroom observation report was, thus, raised in an untimely manner and, accordingly, we have no jurisdiction to decide the merits of the Federation's claim.

However, we do not find the Federation's allegation that the Dean failed to meet the deadline in entering her reappointment recommendation in Grievant's personnel file was untimely raised. The Dean's recommendation not to reappoint Grievant was made and placed in Grievant's personnel file on December 10, 1980. However, Grievant did not see the recommendation until December 15. No evidence before us demonstrates Grievant could have been reasonably aware of the recommendation prior to this date. The Dean did not personally notify him of her recommendation. The first suspicion he could have the Dean made her recommendation was December 12, when the President notified Grievant he was not reappointed. Grievant was diligent in becoming aware of the contents of the recommendation by

checking his personnel file on December 15, only three days later, and we find that date to be the date the grievance clock started running. Accordingly, Grievant had until February 8, 1981, to grieve the recommendation. By grieving the late filing February 6, Grievant met the contractual deadline.

With regard to the merits of the claim, the issue is whether the Dean failed to enter her recommendation in the personnel file within a reasonable time prior to the non-reappointment decision. The Federation contends she did fail and, thus, Grievant had no opportunity to seek to influence the President's decision by entering a written rebuttal of these materials.

The relevant portions of the Agreement are as follows:

The faculty member shall have the right to grieve the insertion in his personnel file of any administrative report which he or she alleges to be untrue or inaccurate. A faculty member shall have the right to have relevant material added to his personnel file... The faculty member shall have the right to respond to any document in his personnel file and have such response included in such file and attached to the appropriate document (Article XXI, Personnel File, Section 1).

The Dean or other appropriate administrative officer shall forward his written evaluations and recommendations to the faculty member's personnel file by the dates specified in other Articles of this Agreement... (Article XXII, Faculty Evaluation, Section 3).

Grievant is a second-year faculty member, and there is no date specified elsewhere in the Agreement relative to reappointment decisions of second-year faculty concerning placement of the Dean's evaluation in the personnel file.

We find two violations of this contractual language. First the contract provides the Dean shall forward written evaluations and recommendations on faculty members to the personnel file. A recommendation was forwarded to the file by Dean Beston, but no evaluation was ever placed in the file. Second, the contract gives the faculty member the right to

respond to any document in his personnel file. The Dean placed her recommendation on Grievant in the file December 10, only two days before the President reached his decision. This abrogated Grievant's rights to rebut the recommendation, since two days is certainly not sufficient time to file a response.

However, we do not find these contract violations "caused the President to exercise his discretion not to rehire" Grievant. Vermont State Colleges Faculty Federation and Michael Peck v. Vermont State Colleges, 139 Vt. 329 (1981). If we take the Federation's view that Grievant was not reappointed because of his political and union activity, no response Grievant could have made to an evaluation or recommendation would have changed the President's decision. If we adopt the Colleges' view that Grievant was not reappointed because of his teaching effectiveness, no argument advanced by Grievant defending his teaching was likely to persuade the President because his decision was made on the vigor and variety of student criticisms. Accordingly we do not believe ~~remanding this case to have President Meier~~ reconsider his decision could possibly accomplish anything. Compare with Grievance of Richard McDonald, 4 VLRB 280 (1981).

Nonetheless, the procedural violations were not without negative consequences to Grievant. As we stated in Vermont State Colleges Faculty Federation and Michael Peck v. Vermont State Colleges, 4 VLRB 334, at 341 (1981):

If...the Dean had done a written evaluation of Grievant's performance...Grievant would have been provided with an assessment of his performance, his procedural rights would have been protected, and this may have been an aid to him in securing employment elsewhere.

Here, we are aware Grievant was successful in obtaining employment elsewhere; nevertheless he was still denied an assessment of his performance and his procedural rights were violated. Grievant is entitled to have a

Written evaluation of his performance by the Dean placed in his personnel file if he desires. Moreover, he is entitled to damages because the Colleges denied him a fundamental right to rebut evaluations of his performance. Additionally, we are obligated to enforce provisions of a collective bargaining agreement by 3 VSA §982(g), and we believe it is appropriate in a case like the one before us to discourage disregard of negotiated provisions by awarding monetary damages. Peck, supra at 342.

There is no precise way to measure damages in the case before us. However, we are aware Grievant was present on all three hearing days before us, and had to travel from Pennsylvania to be here. Taking into consideration the expense he incurred in attending the hearings and our responsibility to enforce the Agreement, we believe \$1500 is reasonable damages to award Grievant to make him whole.

Failure of the College to Publish Criteria for Reappointment and Consider Evaluative Criteria

The Federation alleges the College failed to publish criteria for reappointment. For the reasons stated in Grievance of Stewart McHenry, 4 VLRB 236 (1981), we disagree. The August 8, 1980, Administrative Policy and Criteria for Initial Appointment, Promotion and Tenure of Full-Time Faculty provides the faculty members up for reappointment with clear indication of the criteria by which s/he will be evaluated. Moreover, the Federation claim that Grievant was not evaluated by criteria is unsupported by the evidence. Dean Beston and President Meier used the August 8, 1980, criteria in determining whether Grievant should be reappointed.

Discrimination based on Union and Political Activity and Violation of Academic Freedom

The Federation argues Grievant's First Amendment rights of free

speech were violated. We have no jurisdiction to decide, and provide remedies for cases involving constitutional questions. The case before us is a grievance, and Article III(4) of the Agreement limits grievances to an "expressed dissatisfaction...with aspects of employment or working conditions under this Agreement or the discriminatory application of a rule or regulation..." This language parallels the statutory language defining a grievance found in 3 VSA §902(14), and 3 VSA §1002(d) directs the Board to "not modify, add to, or detract from a collective bargaining agreement" by any decision. However, the language of Article IV and V may import constitutional standards into the Agreement requiring us to look to constitutional law to interpret those articles.

The issue before us, then, is whether Grievant was discriminated against because of political and union activity in violation of Article IV, Anti-Discrimination, of the Agreement, or deprived of his rights of academic freedom under Article V, Academic Freedom of the Agreement.

Article IV and V, in their totality, provide:

ARTICLE IV  
Anti-Discrimination

The parties shall not discriminate against any faculty member or against any applicant for employment in positions in the faculty by reason of age, race, creed, marital status, color, sex, religion, national origin, citizenship, union activity, political activity, or membership or non-membership in the Federation.

ARTICLE V  
Academic Freedom

It is the Policy of the Vermont State Colleges to maintain and encourage full freedom of inquiry, teaching and research. Academic Freedom implies not only the unconditional freedom of discussion in the classroom, but also the absence of unreasonable restrictions upon the classroom instructor's methods. It shall be the right of the instructor to discuss in his classroom any material which relates to his subject. In his role as citizen,



every faculty member has the same freedom as other citizens. However, in his extramural utterances he must indicate that he is not an institutional spokesman, where he or she could reasonably be perceived as such within the community where the utterance is made.

Our initial task is to determine whether Grievant, in fact, engaged in "political" or "union" activity. We will then consider whether his activities are within the protection of Academic Freedom. We do so because we conclude the legal principles applicable to both rights are similar.

Activity engaged in by Grievant included membership in the Federation and regular attendance at Federation meetings; organizing faculty opposition to the low rate of pay for part-time faculty for a short time, criticism of the Castleton Administration's policies of increasing the administrative staff, pushing the faculty to publish, emphasizing faculty possess a terminal degree, and providing insufficient funds for remedial education; membership on the Action Committee which was formed to establish better dialogue between the faculty and administration; and being instrumental in the organization and content of a "reconvocation" designed to rebut President Meier's statements at the 1980 Fall Convocation.

Whatever else can be said about Grievant's activity, we do not believe it was "political" activity in the context of the Agreement. Political Activity is defined in Ballantine's Law Dictionary (3rd Ed, Lawyer's Cooperative Publishing Co., 1969, pg. 959) as:

serving on a political committee, holding office in a party organization, making partisan speeches or campaigning for candidates.

We think this definition is appropriate, and conclude the term relates to participation in electoral politics. Thus the intent of

Article IV is to prohibit discrimination because of a faculty member's activity in political parties. Political activity does not encompass the activities Grievant was engaged in which were restricted to the internal administration of a state college.

Grievant's activity is more properly considered union activity. It is evident Grievant's afore-mentioned activities involving criticism of the Administration policies and actions were consistent with, and part of, the objectives of the Federation.

The next concern of the Board is whether the contents of Article V of the Agreement, Academic Freedom, extend to protection of Grievant's activities. Most of Article V relates to a faculty member's freedom in the classroom, and no evidence demonstrates any restriction on Grievant's instructional methods. However, one section of Article V provides: "In a faculty member's role as citizen, he/she shall continue to have the same freedom as other citizens..."

The Colleges argue the contractual language refers to a faculty member's rights off-campus, and that since all of Grievant's activity was done on-campus as an employee, the section does not apply to him.

However, we think this statement is an expression of the First Amendment rights any public employee has to criticize employers and speak out on public issues and necessarily requires analysis of First Amendment principles to give it effect.

Therefore, we need to determine whether Grievant's actions involve matters of general public concern and so fall under the protection of the contractual language.

Many of Grievant's activities addressed issues central to the administration of the College - i.e. qualifications of faculty, criticism

of allocation of funds to increasing administrative staff instead of improving the pay of part-time faculty or providing more funds for remedial education - and, thus, matters of public concern. The gravamen of the Federation's action was the requirement that faculty have a terminal degree to be tenured. This requirement has the potential of changing the character and mission of the Colleges and thus is of public importance. Many superior teachers have been terminated under this policy. cf. Fairchild, 4 VLRB 164 (1981), D'Aleo, 4 VLRB 192 (1981), Lewandoski, 4 VLRB 347 (1981). We, ourselves, question the wisdom of those actions. Accordingly, we find Grievant's activity to be within the parameters of protected speech. Furthermore, Grievant had visibility as a public critic of the Castleton administration through the September 5, 1980, article in the Rutland Herald, wherein he was quoted as accusing President Meier of dishonesty in making statements on the achievements of the College in his first year as President in the Fall 1980 Convocation speech.

For the purpose of analyzing this case, then, we assume all of Grievant's activities are protected by his right of Academic Freedom and his right to engage in union activity. However, this does not mean a faculty member, as a public employee, is free to give unlimited criticism of his/her employer. The problem in any case is to arrive at a balance between the interests of the public employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, *supra*. Fisher v. Walker, US Ct. of Appeals, 10th Circuit, 81 LRRM 2654 (1972). (five-day suspension of fireman who was union president for writing letters in

union publications criticizing department officers for forming separate organization upheld where letters contained false criticism of immediate supervisor, were disruptive and injurious to morale of department, and matter discussed in letter was of departmental rather than of general public interest). For example, impugning the integrity of your employer by calling him a liar in the public press is close to the line of permissible conduct, but considering this case in its total context, we need not reach that issue.

Accordingly, Grievant has demonstrated that his activity was protected by his contractual rights to Academic Freedom and to engage in union activity without being discriminated against. In determining whether Grievant was not reappointed for engaging in such activity, we employ the analysis used by the US Supreme Court and adopted by the National Labor Relations Board in such cases. Once the employee has demonstrated his conduct was protected, he must then show the conduct was a motivating factor in the decision not to rehire him. Then the burden shifts to the employer to show by a preponderance of the evidence it would have reached the same decision even in the absence of the protected conduct. Mt. Healthy City School District Board of Education v. Doyle, 429 US 274 (1977). Wright Line, 105 IRRM 1169 (1980); State v. Whitingham School Board, 138 Vt. 15 (1979); NLRB v. Fixtures Manufacturing Corp., 8th Circuit Court of Appeals, January 14, 1982.

The reason why it is not sufficient for a terminated employee to simply show protected conduct played a part in the termination decision in order to be reinstated is set out in Mt. Healthy, at 285:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred.

Rationale for the shifting burden of proof is well-explained in Wright-Line, *supra* (at 1174):

Under the Mt. Healthy test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof" Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

We appreciate the criticisms made of the Mt. Healthy approach (See "Free Speech and Impermissible Motive in the Dismissal of Public Employees", Yale Law Journal, Volume 89:376, 1979 "What Hath Mt Healthy Wrought?", Michael S. Wolby, Ohio State Law Journal, December 1980) because usually an employer can think of a non-protected reason to dismiss an employee since most employees do something from time to time to displease their employer. Therefore, we have carefully examined the actions of all parties concerned and have given great weight to the character and demeanor of Grievant and President Meier as they appeared before us.

Guidelines for determining whether protected activities engaged in by an employee were a motivating factor in the employer's decision to terminate the employee include whether the employer knew of the employee's protected activities, whether there was a climate of coercion, whether the timing of the discharge was suspect, Ohland v. Dubay, 133 Vt. 300 (1975); whether the employer gave as a reasons for his decision a protected activity, Mt. Healthy, *supra*; Givhan v. Western Line Consolidated School District, 439 US 410 (1979), Pickering v. Board of Education, *supra*.; whether an employer interrogated an employee about protected activity, NLRB v. Fictures Manufacturing Corp., *supra*; whether the employer discriminated between employees engaged in protected activities and employees not so engaged, National Labor Relations Board v. Great Dane Trailers, Inc., 388 US 26 (1967); or whether the employer warned the employee not to engage in protected activity, Fry Roofing Co., 99 IRRM 1544 (1978).

The evidence before us leaves us in doubt whether Grievant's protected conduct was a motivating factor in President Meier's decision not to reappoint Grievant; thus Grievant has not sustained his burden of proof. It is established both Dean Beston and President Meier were aware of many of Grievant's activities in opposition to their policies and actions and knew from the September 5, 1980, Rutland Herald article Grievant was quoted as accusing President Meier of dishonesty and stating he wished the President would leave Castleton. However, no actions or statements of the Dean or President indicate their knowledge of Grievant's protected conduct resulted in the protected conduct being a motivating factor in the non-reappointment decision. The Federation sought to establish a climate of coercion at Castleton through the resignation of Grievant's

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fellow faculty member Barbara Bloy in June, 1980. Bloy resigned because she felt she would ultimately be discharged for her views critical of the Administration. However, no one in the Administration gave Bloy an indication her job was in jeopardy. Evelyn Stagg, a faculty member in Grievant's department, has recently resigned because she is not happy with the atmosphere at Castleton which she believes does not encourage dissension or discussion. Despite these perceptions by faculty, this does not demonstrate a climate of coercion at Castleton; compelling faculty to think and act in ways consistent with the views of the Administration. Rather, it appears dissident faculty members are leaving Castleton not because they are being forced out by the Administration, but because they are frustrated at the direction the Administration is taking the College; a direction they perceive as ruinous.

We cannot find the timing of Grievant's non-reappointment suspect. Although he was not reappointed in the same year he was active in opposition to the Administration, the non-reappointment also occurred the last year Grievant could be terminated without the College giving reasons for it. Castleton's commitment to a faculty member becomes increasingly firm as their years of service progress, and Grievant was not reappointed in a year where the President had broad discretion.

The Federation further sought to demonstrate Grievant was discriminated against relative to two faculty members, Anne Sheppard and Patrick Cavanaugh, who were not engaged in activity critical of the Administration. Sheppard and Cavanaugh were second-year faculty members reappointed the same year Grievant was terminated. In comparing the overall ratings received by Grievant, Sheppard and Cavanaugh in student evaluations,

there is little to distinguish among them. However, Grievant is the only one of the three whose evaluations show a pattern of not respecting student opinion, and the only one to excite such strong reaction in a department that its chairperson requested he never be assigned to teach in that department again. Given such facts and the broad discretion granted the President in second-year reappointment decisions, we cannot find Grievant was discriminated against relative to Sheppard or Cavanaugh. There was no discriminatory application of the reappointment criteria, as alleged by the Federation.

No further actions or statements by Beston or Meier demonstrate Grievant's protected conduct was held against him. The Dean stated she was offended by Grievant's comments at a wine and cheese party concerning use of administrative jargon by deans, which she took as a personal statement about her. However, it is not evident by any of her subsequent actions she used the incident against Grievant (although, as we point out later, she legitimately could). We have before us no actions by the Dean or President warning or interrogating Grievant concerning his protected activities; nor did either of them give as a reason for non-reappointment the protected conduct. We conclude Grievant has not demonstrated his protected activities were a motivating factor in his non-reappointment.

Even if we assume the protected conduct was a motivating factor in the non-reappointment, we still find the Colleges have shown by a preponderance of the evidence the President would have reached the same decision even in the absence of the protected conduct. Mt. Healthy, supra; Wright Line, supra. Here, the Colleges give as a reason for non-reappointment Grievant



was not substantially above-average in teaching effectiveness. In such dual-motive cases, where the employment decision involves two factors - a legitimate business reason and an illegitimate employer reaction to its employees engaging in protected activities, we will weigh the interests of the employees in engaging in protected activity and the interests of management in promoting the efficiency of the public services it performs through its employees and strike a balance between the competing interests. Mt. Healthy, supra at 284. Wright Line, supra, at 1174.

We note that in a case like the one before us where the President is normally not required to give any reasons for non-reappointment (Article XXIII of the Agreement), we will look to the reasons only where protected conduct is alleged as a motivating factor for the non-reappointment decision.

Sufficient evidence exists here from which the Dean and President could have reasonably concluded Grievant was not above average in teaching effectiveness. Grievant's student evaluations over the three semesters he taught at Castleton prior to his non-reappointment demonstrate a pattern of not respecting student opinion. Regardless of a strong majority of students rating Grievant above average as a teacher, the existence of a significant minority of students feeling degraded, humiliated, and embarrassed can reasonably lead an evaluator to question a teacher's effectiveness. These negative student evaluations are buttressed by the Chairperson of the Education Department, Virginia Larrabee, being so incensed by Grievant's teaching in her Department, she asked Dean Beston that Grievant never be allowed to teach in the Education Department again. Were it not for this incident, it would be difficult for the

Dean and President to support their subjective opinion Grievant was not substantially above average in teaching effectiveness, given a statistical analysis of student evaluations demonstrating a strong majority of students believed to the contrary. Accordingly, we find credible the College's contention that Grievant was not reappointed because of his teaching effectiveness.

Moreover, other actions and statements by Grievant constituted legitimate reasons for not retaining him. In a May, 1980, letter to Dean Beston, Grievant expressed his contempt for Castleton students, calling them a "modestly-talented student body that often discourages efforts at subtlety, wit, and deeper penetration of subjects." Also, he appeared to be given to high-blown, pompous rhetoric inflating his own self importance. This is demonstrated in a May, 1980, memo to the Action Committee in which he stated:

In the brave new world of Castleton, only the craven who submit to redefinition will succeed. The naive idealistic and humane faculty who unashamedly love teaching...will be depreciated, if not humiliated and dismissed (humanely under our new accords).

Grievant's comments at a wine and cheese party on the use of administrative jargon by deans, which Dean Beston reasonably inferred referred to her, show a lack of tact and judgment on the appropriate forum to carry on critical dialogue. Through his arrogant demeanor and expressed contempt for the Castleton students and administration, Grievant gave the impression teaching at Castleton was beneath him. This attitude, it seems to us, would be an additional valid reason for not reappointing him, given the broad discretion granted the President in employment decisions of first and second-year faculty members.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

1. Dean Rosemarie Beston shall submit a written evaluation of Grievant, William Sypher, to Grievant's personnel file in accordance with Article XXII(3) of the Agreement, within 30 days of the date of this Order if Grievant requests such submission within 10 days of the date of this Order;
2. the Vermont State Colleges shall pay Grievant the sum of \$1,500; and
3. the decision not to reappoint Grievant shall be allowed to stand.

Dated this 25<sup>th</sup> of March, 1982, at Montpelier, Vermont.

*Appeal to Sup Ct.  
Dismissed by Sup.  
Nov. 1982*

VERMONT LABOR RELATIONS BOARD

*Kimberly B. Cheney*  
Kimberly B. Cheney, Chairman

*William G. Kemsley, Sr.*  
William G. Kemsley, Sr.

*James S. Gilson*  
James S. Gilson

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:

WILLIAM SYPHER AND THE  
VERMONT STATE COLLEGES  
FACULTY FEDERATION

DOCKET NO. 81-24

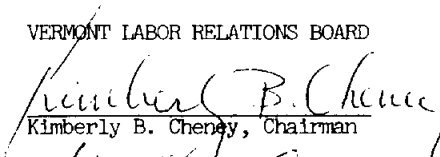
ORDER ON GRIEVANT'S MOTION  
TO RETRACT AND RECONSIDER AND MOTION TO  
REOPEN FOR ADDITIONAL EVIDENCE AND MEMORANDA

The Vermont State Colleges Faculty Federation, having filed a Motion to Retract and Reconsider and a Motion to Reopen for Additional Evidence and Memoranda; and it appearing that no transcript of the recording in this case having been filed in either the Supreme Court or Superior Court; and the Board having considered the parties' memoranda, it is hereby ORDERED:

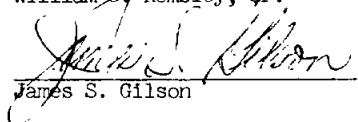
- 1) The Opinion and Order issued March 25, 1982, is hereby withdrawn pursuant to 3 VSA §924(b);
- 2) Grievant's Motion to Retract and Reconsider is granted for the reasons stated in Grievant's motion;
- 3) Grievant's Motion to Reopen for Additional Evidence and Memoranda to take the testimony of Virginia Larrabee is granted; and
- 4) The Clerk shall notify the parties of a date for hearing to take the testimony of Virginia Larrabee.

Dated this 6<sup>th</sup> day of May, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Kimberly B. Cheney, Chairman

  
William G. Kemsley, Sr.

  
James S. Gilson